Supreme Court, U.S.
FILED
071277 APR 8 - 2008
OFFICE OF THE CLERK

90

(1)

No.

In The
Supreme Court of the United States

LARRY LOMAZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

*Robert A. Dixon
ATTORNEY AT LAW
4403 St. Clair Avenue
Cleveland, OH 44103

216-432-1992

Attorney for Petitioner

**Counsel of Record*

April, 2008

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

QUESTIONS PRESENTED FOR REVIEW

WHETHER the Sixth Amendment guarantees a Defendant in a Criminal Contempt action the right to counsel at all stages of the proceedings.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Questions Presented for Review i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Opinion Below 1

Jurisdictional Statement 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

A. Procedural History 2
B. Relevant Facts 4

Argument 5

Conclusion 11

TABLE OF AUTHORITIES

CASES **Page No.**

Coleman v. Alabama, 399 U.S. 1, 8 (1970) 9

Fleming v. Kemp, 475 U.S. 1058;
106 S.Ct. 1286, 1287 (1986) 9

Pointer v. Texas, 380 U.S. 400 (1965) 10

United States v. Lomaz,
Case №99-02240 1

United States v. Wade,
388 U.S. 218, 224 (1967) 5, 6, 9

STATUTES

15 U.S.C. §1263(a) 3
18 U.S.C. §401(3) 1
28 U.S.C. §1254 2
28 U.S.C. §1291 1

OTHER AUTHORITIES

73 Yale L. J. 1000, 1030-1033 (1964) 5

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On January 9, 2007, the United States Court of Appeals for the Sixth Circuit issued an opinion (United States v. Lomaz, 06-4071, Appendix A) affirming the Judgment and Sentence of the United States District Court for the Northern District of Ohio finding the Petitioner guilty of criminal contempt. The District Court had imposed a sentence of thirty days imprisonment and a fine of five thousand ($5,000.00) dollars on June 8, 2006 (United States v. Larry Lomaz, Case No.99-02240, Appendix B)

JURISDICTIONAL STATEMENT

Jurisdiction of the trial court was invoked pursuant to 18 U.S.C. §401(3) and the terms of a consent decree.

The jurisdiction of the Court of Appeals to review a final judgment of the District Court was invoked pursuant to 28 U.S.C. § 1291.

The Petitioner seeks review of the judgment of the Court of Appeals for the Sixth Circuit issued on January 9, 2008, pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On May 30, 2003, the United States of America resolved by consent decree its action against several corporate entities and the Petitioner Larry Lomaz for

alleged violation of 15 U.S.C. §1263(a) and(c) by introducing, delivering for introduction, and receiving in interstate commerce fireworks which were either banned or misbranded for hazardous substances. In August 2003 the government filed a Petition for an Order to show cause why the Appellant should not be held in contempt for alleged violations of the decree. A week-long hearing was held before the Magistrate Judge. On November 28, 2005 the Magistrate Judge filed his Report and Recommendation finding that the appellant should be found to be in contempt of court for violation of several provisions of the decree and recommending a punishment of one (1) day in jail and a fine of five hundred ($500.00).

On June 8, 2006, the District Court adopted the portion of the Report and Recommendation findings that the Appellant was in contempt for violation of several provisions of the decree. However, the court did not adopt the Magistrate's suggested sentence, and instead sentenced the Appellant to a term of thirty (30) days and a fine of five thousand ($5.000.00) after the government had requested that the sentence be increased.

B. RELEVANT FACTS

The allegations of various alleged violations of the consent decree by the Petitioner are, for the most part, detailed and technical in nature and not relevant to this proceeding. For purposes of this action it is sufficient to note that the Magistrate Judge and subsequently the District Judge below found the Petitioner, Mr. Lomaz, in violation of certain specific provisions of the decree after a week-long evidentiary hearing.

After hearing all of the evidence and listening to the arguments of counsel the Magistrate suggested a sentence of one (1) day in jail and a fine of five hundred ($500.00) as punishment for the criminal contempt.

Shortly after the hearing but before the decision of the Magistrate, counsel for the Appellant was suspended from the practice of law and discontinued representation. Although the District Court was made aware that the Petitioner was left without counsel and even received a communication indicating the he was forced under the circumstances to represent himself, the Court failed to conduct an inquiry regarding whether Mr. Lomaz was knowingly and voluntarily proceeding pro se or was merely doing so out of necessity. Even though this was a

criminal contempt proceeding resulting in a jail sentence, the issue of counsel, or lack thereof, was never addressed, despite awareness by the court of the counsel's absence. During the time that the Petitioner had no counsel, the government filed objections to the magistrate's sentence and urged the District Judge to impose a significantly higher sentence than that recommended by the Magistrate Judge. In fact, the District Court did impose a higher sentence of thirty (30) days incarceration, all while the Petitioner was unrepresented by legal counsel.

The District Court entered a stay of execution of sentence pending appeal.

ARGUMENT

THE SIXTH AMENDMENT GUARANTEES A DEFENDANT IN A CRIMINAL CONTEMPT ACTION THE RIGHT TO COUNSEL AT ALL STAGES OF THE PROCEEDINGS.

> "Though the colonial provisions about counsel were in accord on few things... the colonists appreciated that if a defendant were forced to stand alone against the state, his case was foredoomed." *United States v. Wade*, 388 U.S. 218, 224 (1967) (citing 73 Yale L. J. 1000, 1030-1033 (1964).

Hence, the Sixth Amendment to the Constitution of the United States provides in relevant part:

> In all criminal prosecutions the accused shall enjoy the right to ... the assistance of counsel

Petitioner suggests that the decision of the Sixth Circuit Court of Appeals in this case, if allowed to stand, would have the effect of placing an asterisk after the Sixth Amendment with the qualification that the right may depend on how any particular judge defines the nature of the proceedings.

> In *United States v. Wade*, 388 U.S. at 226, it was said of the right to counsel:
>
> > It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.

In the present case it is clear that during the pendency of the criminal contempt proceedings below the Petitioner's retained counsel was suspended from the practice of law by the Ohio State Bar Association (and later the United States District Court in which this case arose) and was completely out of communication with the Petitioner. It is also clear that the government and the Court below were aware of this fact. It was the government itself that urged Mr. Lomaz to obtain new counsel, "based upon the relief sought by the government." (See "Plaintiff's Notice of Communication From Defendant and Related Matters" (Apx. D) This warning obviously referred to the fact that in the absence of counsel the government was requesting that the District Court significantly increase the sentence of imprisonment from the one (1) day recommended by the Magistrate Judge who heard the evidence.

The government requested that the District Court Judge raise the sentence to six (6) months imprisonment as well as requesting a significant raise in the fine. The District Court, also in the absence of counsel, and without oppositional filing on the part of the Petitioner, increased the sentence to thirty (30) days and increased the fine from $500.00

(five hundred dollars) to $5,000.00 (five thousand dollars).

The Court of Appeals below disposed of Mr. Lomaz's Sixth Amendment claim on two bases. First, the Court concluded that Mr. Lomaz had invoked his constitutional right to self representation and waived counsel. Yet the record in the District Court is devoid of any finding by the Court that Mr. Lomaz had actually desired to represent himself, as opposed to being *forced* to represent himself due to the unexpected absence of counsel. In reality, the pleading filed by Mr. Lomaz which the Court felt was an invocation of his right to self-representation itself begins with the following: "The defendant is *forced* to file this response pro se, as the defendant's attorney Alex Jurczenko has been suspended to practice as an attorney." (See "Defendant (Lomaz) Answer to Plaintiff's Motion", Apx. C). Despite this plea, the Record is further devoid of any colloquy or inquiry whatsoever on the part of the District Court on the issue of voluntariness of self-representation.

Secondly, the Court of Appeals below found that inquiry into voluntariness was unnecessary by simply concluding that "...the period during which the defendant went unrepresented was not a critical stage of the proceedings." (Opinion at 5). Petitioner

submits that a stage in the proceedings wherein the court increases the recommended sentence times thirty cannot be viewed as anything but critical. The Sixth Amendment violation becomes more prominent when it is realized that the District Court had before it the unopposed Motion of the Government urging the increased sentence.

By characterizing the time period without counsel as non-critical, the Court of Appeals easily found no constitutional violation and engaged in the kind of reasoning criticized by this Honorable Court in *United States v. Wade*, 388 U.S. at 226-27. In *Fleming v. Kemp*, 475 U.S. 1058; 106 S.Ct. 1286, 1287 (1986)(Marshall, J., dissenting), it was stated that "Sixth Amendment rights, however, do not turn on how a *proceeding is characterized...*" *(citing Coleman* v. Alabama, 399 U.S. 1, 8 (1970)(plurality opinion). Rather, Justice Marshall pointed out that:

> The actual inquiry is whether "counsel's absence might derogate from the accused's right to a fair trial " *Fleming v. Kemp*, 106 S.Ct. 1286, 1288 (quoting *U.S. v. Wade*, 388 U.S. at 226.

In the present case there is no question that despite the somewhat unusual nature of the

proceedings, the Petitioner was unrepresented while the government and its several attorneys were strenuously urging the District Court Judge to raise the period of incarceration. It was clearly the sentencing phase of the proceedings. It is also clear that the absence of counsel during this stage derogated the Defendant's Constitutional right. *Wade* holds that the Constitutional right to counsel cannot be overridden, as here, by mischaracterization of the nature of the proceedings. As Mr. Justice Black observed in *Wade, supra*, at 1942-1943 (concurring in part and dissenting in part):

> I am wholly unwilling to make the specific constitutional right to counsel dependent on judges' vague and transitory notions of fairness and their equally transitory, though thought to be empirical, assessment of the "risk that...counsel's absence...might derogate from... [a defendant's] right to a fair trial." (quoting Goldberg, J., concurring, *Pointer v. Texas*, 380 U.S. 400, 412)(1965).

Petitioner respectfully asserts that his right to counsel was violated in the District Court and that he was left without remedy due to improper

characterization of the proceedings by the Sixth Circuit Court of Appeals.

CONCLUSION

The Petition for Writ of Certiorari should be granted to preserve the vitality of the Sixth Amendment and to vindicate the principles set forth by previous decisions of this Court.

Respectfully submitted,

/s/ROBERT A. DIXON
4403 St. Clair Ave.
Cleveland, Ohio 44103
(216) 432-1992

Counsel of Record for Petitioner

APPENDIX

SIXTH CIRCUIT COURT APPEALS FILINGS:

Opinion,
filed 01/09/08 ..... A1 - A11

NORTHERN DISTRICT OF OHIO FILINGS:

Order and Opinion,
filed 06/08/06 ..... B1 - B16

Defendant (Lomaz) Answer to
Plaintiff's Motion,
filed 01/20/06 ..... C1 - C2

Plaintiff's Notice of Communications
from Defendant and Related Matters
with Exhibits,
filed 01/04/06 ..... D1 - D12

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 08a0024n.06
Filed: January 9, 2008

06-4071

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LARRY LOMAZ,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: DAUGHTREY, GILMAN, and COOK, Circuit Judges.

PER CURIAM. The defendant, Larry Lomaz, appeals the judgment of the district court finding him guilty of criminal contempt, sentencing him to 30 days' incarceration, and fining him $5,000. Lomaz contends that he is entitled to a new sentencing hearing (1) because his Sixth Amendment right to

counsel was violated when he was left without representation during what he alleges was a critical stage of the proceedings and (2) because the district court considered improper evidence in determining his sentence. We find no reversible error in connection with these two claims and, therefore, affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

The events giving rise to this appeal originated in 1999, when the government sued defendant Lomaz, who was in the business of distributing fireworks, for unlawful dealing in devices that were banned or misbranded. The government charged the defendant with selling and transporting contraband fireworks in interstate commerce in violation of the Federal Hazardous Substances Act, 15 U.S.C. §§ 1263(a) and (c) (the Act). In January 2000, the district court entered a permanent injunction against Lomaz, enjoining him from dealing in banned and misbranded fireworks. We affirmed the judgment on appeal. *See United States v. Midwest Fireworks Mfg. Co.*, 248 F.3d 563, 565 (6th Cir. 2001).

In May 2003, based on the government's petition for a finding of contempt containing

allegations that Lomaz was in violation of the 2000 injunction, the parties entered into a consent decree that set out a specific plan for Lomaz's compliance with the district court's orders. Within a few months, however, the government charged that Lomaz was violating the consent decree and again filed a petition seeking an order to show cause why Lomaz should not be held in contempt. The magistrate judge heard evidence on October 9, 2003, and December 1, 2003. Prior to the October 9, 2003 hearing, Lomaz's counsel had withdrawn, and Lomaz appeared *pro se*, representing himself in both the October and the December hearings. He testified on his own behalf and cross-examined witnesses. The government withdrew the petition when Lomaz agreed to modify the consent decree to include further conditions.

Within a year or so, however, the government again alleged that Lomaz had violated the consent decree by receiving and distributing fireworks in violation of the Act. In March 2003, the government requested another order to show cause why Lomaz should not be found in contempt, resulting in a week-long hearing in August 2005 before the magistrate judge, at which the defendant was represented by an attorney, Alexander Jurczenko. At the conclusion of the hearing, the magistrate judge

requested proposed findings of fact and conclusions of law from both parties. Within a week after the hearing concluded, however, Jurczenko was suspended from the practice of law in the state courts of Ohio. Despite the fact that he continued to represent Lomaz temporarily in this federal court action and was granted a two-week extension in which to file proposed findings of fact and conclusions of law, nothing further was filed by Jurczenko on his client's behalf. Jurczenko was ultimately suspended from practice in federal court, including representation in this case, on December 27, 2005, a month after the report and recommendation was filed by the magistrate judge on November 28, 2005.

In his report, the magistrate judge recommended that Lomaz be fined $500 and sentenced to one day of incarceration. Objections were to be filed within ten days. The government timely filed an objection; Lomaz did not. Citing the defendant's "flagrant and willful violations" of the district court's orders, the government insisted that "the punishment should be far more severe" than the nominal penalty recommended by the magistrate judge. The government urged that, instead, the defendant be fined $65,000 and incarcerated for six months.

On January 4, 2006, the government filed a notice in federal court, advising the court that Lomaz had dismissed Jurczenko as his attorney and had requested from the government a copy of its objections to the magistrate judge's report and recommendation. After receiving a copy of the government's objections, Lomaz filed a response on his own behalf, asking the district court for leave to proceed pro se because his attorney had been suspended from practice in Ohio and urging the district court to accept the findings of the magistrate judge in the report and recommendation.

On June 8, 2006, the district judge issued an order and opinion adopting most of the findings in the magistrate judge's report but declining to follow the magistrate judge's sentencing recommendation. Instead, the judge fined Lomaz $5,000 and sentenced him to 30 days' incarceration. After the defendant's motion for reconsideration of the sentence was denied, he filed this appeal.

DISCUSSION

As an initial matter, we note that the defendant did not raise his Sixth Amendment claim in the district court, instead contending merely that the district court abused its discretion in assessing a fine and sentence in excess of the magistrate judge's

recommendation. We therefore review the claim on appeal for plain error only. *See United States v. Mahon*, 444 F.3d 530, 532 (6th Cir. 2006). In this case, we find none.

Although the defendant now claims that he was deprived of the right to counsel by the district court, the record indicates that by invoking his constitutional right to represent himself, Lomaz actually waived his right to counsel. *See King v. Bobby*, 433 F.3d 483, 490 (6th Cir. 2006) (recognizing "the intersection of two rights: the Sixth Amendment rights to self-representation and to an attorney" and holding that "[w]hen a defendant invokes one, he necessarily waives the other"). Normally, our next step would be to determine whether the defendant's waiver in this case was voluntary and knowing, and therefore valid, see id., or whether, as he now insists, he was forced into self-representation against his will because of counsel's suspension from practice. In this case, however, that step in the analysis is unnecessary, because we conclude that the period during which the defendant went unrepresented was nota critical stage of the proceedings. Indeed, the only event that post-dated the suspension of counsel was the actual filing of the district court's order adopting the magistrate judge's findings and

imposing the sentence, which was the only phase of the proceedings then left uncompleted.

The defendant, now represented by counsel on appeal, claims that the district court's failure to make a *sua sponte* inquiry regarding the defendant's *pro se* status or to test the validity of his waiver of counsel constituted a violation of the right to counsel. In support, he cites *United States v. McDowell*, 814 F.2d 245 (6th Cir. 1987). In that case, however, we declined to adopt a per se rule requiring automatic reversal in the absence of a "deliberate and searching inquiry." *Id.* at 248. Instead, we adopted a "nonformalistic approach to determining sufficiency of the waiver from the record as a whole." Moreover, the law in this circuit requires a district court to determine whether pro se representation is knowing and voluntary only if the defendant is representing himself at a critical stage of the proceedings. *See United States v. Tisdale*, 952 F.2d 934, 939 (6th Cir. 1992) (citing *Kirby v. Illinois*, 406 U.S. 682, 690 (1972)). A stage is not critical if there is only "minimal risk" that counsel's absence might impair defendant's "right to a fair trial." *United States v. Wade*, 388 U.S. 218, 228 (1967).

On appeal, the defendant complains specifically about Jurczenco's failure to file proposed

findings of fact and conclusions of law prior to the magistrate judge's decision. Without regard to whether the filing of proposed findings of fact and conclusions of law in a criminal contempt proceeding represents a critical stage, it is clear from this record that counsel's failure to file cannot be said to have violated his client's right to counsel, as a matter of plain error, because there is no allegation on appeal that the magistrate judge's findings of fact and conclusions of law were incorrect in any respect. Likewise, the current complaint concerning the defendant's inability to file objections to the magistrate judge's report and recommendation - due to his lack of representation during the 10-day period following its release - cannot be considered "critical" in this particular case, because it does not appear from the record that there were objections that should have been made at the time. Indeed, the defendant embraced the magistrate judge's sentencing recommendation, which, as it turned out, was clearly favorable to him.

The only other "critical stage" argument raised on appeal concerns the district court's decision to impose a sentence that was "a significant increase" above the sentence recommended by the magistrate judge. But, as the defendant concedes on appeal, that

phase of the litigation was only a "critical 'paper' stage," given the fact that no further litigation was possible at that point in the proceedings. There was, plainly, nothing to be done but await the decision of the district court. That "waiting period" can hardly be said to constitute a critical stage of the proceedings - not only was there no "minimal risk" that the defendant's right to a fair trial might be impaired by the lack of counsel during that period, there was no risk whatever. The sentence that was ultimately imposed, of course, was an exercise of the district court's discretion to fashion an appropriate punishment in a criminal contempt action. It is reviewed on appeal for reasonableness, after defense counsel has had the opportunity to present a challenge to its propriety.

This reasonableness review includes an examination of "the factors evaluated and the procedures employed by the district court in reaching its sentencing determination." United States v. Johnson, 467 F.3d 559, 563 (6th Cir. 2006). The district court is to be guided by factors in 18 U.S.G. § 3553(a) and must establish in the sentencing record that it considered the § 3553(a) factors. See United States v. Watford, 468 F.3d 891, 916 (6th Cir. 2006).

Lomaz first alleges that the sentence he received is unreasonable because the district court abused its discretion in considering outside information, based on observations in the court's opinion that "[i]n recent years, fireworks have caused many severe injuries and significant fire damage to homes and other structures," accompanied by statistics gleaned from various sources set out in the opinion. In his *pro se* motion for reconsideration, the defendant maintained, as he does on appeal, that those statistics were "flawed and biased" and that there was no evidence that anyone had ever been injured by any fireworks that he had sold, a claim that had been aired during the evidentiary hearing in his case. There was no explanation then - and there is none on appeal - concerning what made the statistics mentioned in the court's opinion flawed or biased, and we are thus left with nothing more than the defendant's bald assertion to that effect. Moreover, contrary to the current claim that the district court did not cover the § 3553(a) factors in assessing the sentence, the statistics in question and related information were obviously part of the court's consideration of "the need ... to protect the public" and to fashion a penalty that would "reflect the seriousness of the offense" in terms of its potential

threat, as required by § 3553(a) and explicitly set out as such in the court's opinion. We conclude that the sentence imposed by the district court was reasonable.

CONCLUSION

For the reasons set out above, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LARRY LOMAZ
Defendant.

CASE NO. 5:99-cv-2240

ORDER AND OPINION
[Resolving Doc. Nos. 107, 180]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On, March 2,2005, pursuant to 18 U.S.C. § 401(3) and Federal Rule of Criminal Procedure 42(a), the Government filed a petition to show cause why Respondent Larry Lomaz should not be found in civil and criminal contempt. [Doc. 107.] The matter was referred to Magistrate Judge James S. Gallas for a Report and Recommendation. [Doc. 110.] On November 28, 2005, the magistrate recommended that the Court find the Respondent in contempt and

impose a $500 fine and one day of incarceration. [Doc. 179.] The Government timely objected to the Report and Recommendation, taking issue with several of the magistrate's factual determinations and arguing that the contempt penalty was insufficient. [Doc. 181.]

I. Factual Background

The magistrate's report fully describes the factual background of this case. Therefore, the Court summarizes the most pertinent facts for the purpose of this review.

Defendant Larry Lomaz imports fireworks from China for sale through his various companies. On September 20, 1999, the United States Government ("Government") brought an action against Lomaz for violating the Federal Hazardous Substances Act, 15 U.S.C. §§ 1263(a) & (c), by introducing into interstate commerce banned or mislabeled fireworks containing hazardous substances. On May 30, 2003, this Court issued a Consent Decree against Lomaz, and on February 4, 2004 revised the order. [Docs. 62 & 95.] The Consent Decree required Lomaz to pay a $30,000 disgorgement fee and to provide extra informational reports to regulatory authorities regarding fireworks orders from Chinese producers.

On March 3, 2005, the Government filed a petition to show cause why Lomaz should not be found in civil and criminal contempt pursuant to 18 U.S.C. § 401(3) and Rule 42(a) of the Federal Rules of Criminal Procedure for allegedly violating the terms of the consent decree. [Doc. 107.] The petition was assigned to Magistrate Judge James S. Gallas for a report and recommendation, which the magistrate issued on November 11, 2005. [Docs. 110 & 180.]

Reviewing the Government's petition, the magistrate made twelve findings as to Lomaz's liability for each of the twelve actions that the Government argued were violations of the consent decree. The magistrate found that Lomaz was guilty of eight separate violations of the consent decree. The magistrate also found that the Government had not shown a violation beyond a reasonable doubt on four others. For the eight violations, the magistrate recommended a penalty of one day incarceration and a $500 fine.

The Government specifically objects to four of the magistrate's findings: (1) No Violation of Consent Decree ¶ 11 Regarding the December 24, 2003 Letter of Advice; (2) No Violation of Consent Decree ¶ 6 from Invoice 23FF-016; (3) No Violation of Consent Decree ¶ 11 from the January 16,2004 Letter of Advice; and

(4) No Violation of Consent Decree ¶ 7 Regarding Invoice INV /204/315.

II. Legal Standard

For a district court reviewing a Report and Recommendation's findings where one party has objected, the proper standard of review is *de novo*. *Flournoy v. Marshall*, 842 F.2d 875,875-76 (6th Cir. 1998). Moreover, "only those specific objections to the magistrate's report made to the district court will be preserved for appellate review." *King v. Zamiara*, 150 Fed. Appx. 485,496 (6th Cir. 2005) (citing *Smith v. Detroit Fed'n of Teachers*, 829 F.2d 1370, 1373 (6th Cir. 1987)). Lomaz has not objected to the Report and Recommendation. The government has filed valid objections to four of the magistrate's findings. The Government also Objects to the magistrate's recommended penalty for contempt. Therefore, the Court reviews those five determinations *de novo*.

III. Analysis

The Government objects to four of the magistrate's no violation findings and to the leniency of the criminal contempt penalty. The Court reviews each finding in turn.

A. Violation of Consent Decree ¶ 11 Regarding Invoice 23FF -015 & 12/24/03 Letter of Advice

Paragraph 11 of the Decree states:

> 11. Defendants and Related Persons shall respond to all Letters of Advice from the CPSC within the time specified in the Letter of Advice. Further, Defendants and Related persons shall notify the CPSC within the time specified in the Letter of Advice and pursuant to the terms of the Letter of Advice, what action Defendants and Related persons will take in response to the Letter of Advice.

The magistrate found no violation because he determined that Lomaz had adequately responded to the December 24,2003 Letter of Advice. The magistrate rejected the Government's argument that paragraph 11 requires full "compliance" with the Letter's terms, and held that by its plain language, the paragraph only requires an adequate "response."

The Court agrees with the magistrate's reasoning. Confining the analysis exclusively to the mandate of Paragraph 11, that paragraph neither states nor implies that the defendant must strictly adhere to the letter's instructions. If the paragraph were intended to require rigid compliance, it could state as much. Instead, it requires the Defendant (not the Government) to determine and "notify" the CPSC "what action the defendant and related persons will

take in response to the Letter of Advice." This suggests that the defendant enjoys some discretion in responding to letters of advice. It is clear, however, that in doing so the Defendant must act in good faith. Moreover, he must do so within the time specified in the letter. Provided that the defendant does so, he has fulfilled Paragraph 11' s mandate.[1]

In so holding, the Court notes that this is a criminal prosecution, not a contractual dispute. Were it the latter, the Government's interpretation of Paragraph 11 could conceivably prevail. But because this is a criminal proceeding, the burden lies with Government to prove beyond a reasonable doubt that the Defendant willingly violated the Consent Decree's terms. *Michaelson v. U.S. ex rel Chicago, St. P., M. & 0. Ry. Co.*, 266 U.S. 42, 66 (1924); *TWM Mfg. Co., Inc. v. Dura Corp*, 722 F.2d 1261, 1272 (6th Cir. 1983). Undoubtedly the Government would have preferred

---

[1]The Court rejects the argument that this interpretation renders Paragraph 11 meaningless. The paragraph forces the defendant to engage in a meaningful dialogue about how the defendant will address the problem. It also clearly requires the defendant to devise a plan of action "pursuant to the terms" of the Letter.

that the Decree demanded rigid adherence to a Letter's instructions. But Paragraph II's requirements are ambiguous at best. A criminal defendant cannot be found guilty unless the law gives adequate notice of its requirements.

Here, the Government urges that anything short of rigid compliance with the Letter is illegal. But even assuming, arguendo, that is true, the Decree's vague language fails to adequately notify the Defendant. Accordingly, the Government has not proven beyond a reasonable doubt that the Defendant willingly violated the terms of Decree Paragraph 11.

B. Violation of Consent Decree ¶ 6 from Invoice 23FF -016

The Government next alleges that the magistrate recommendation misconstrues the Government's burden in proving the Defendant's violation of Paragraph 6 of the Consent Decree.

Paragraph 6 states in full:

> Defendants shall test all fireworks devices imported by Defendants or Related Persons from China. Such testing shall be performed by the American Fireworks Standards Laboratory ("AFSL"). Defendants shall not import any fireworks devices that fail such testing. Such testing shall be

> at Defendants' expense. To the extent that AFSL does not test a particular type of fireworks device, Defendants are not obligated to have such fireworks devices tested by AFSL. This Paragraph shall take effect for any order of fireworks devices placed by Defendants or Related Persons after July 5, 2003.

The magistrate found no violation because the Government failed to establish that AFSL has testing procedures for the types of fireworks shipped to defendant pursuant to Invoice 23FF-016. (R&R 12). The Government argues that it does not bear the burden of proving the existence of AFSL tests because, it claims, the fireworks' susceptibility to AFSL testing was not in question. (PI. Obj. 13). Moreover, other invoices on the record, including 23FF-015 and 2004GDA1118, itemize the particular named fireworks on 23FF-016 and bear AFSL certification.[2] The remainder of the items on

---

[2]Invoice 23FF-016 lists ninety cartons of Mars Invader Fountain, Kona Gold Fountain, Area 51 Fountain, and Devastation Fountain. These types also appear on 23FF-015, which bears an AFSL approval seal. AFSL lists extensive testing standards for fountain-type fireworks. *See* Am. Fireworks Standards Laboratory, AFSL Standards 28-36 (Feb. 2005), *available at* www.afsl.org.

23FF-016 are firecrackers,[3] except for one item listed as PUNK which the Government does not challenge.

The Court agrees with the Government and finds Defendant in violation of Paragraph 6. The plain language of Paragraph 6 clearly casts the full burden of procuring and financing AFSL testing on the Defendant, implying that Defendant has the additional correlate duty of becoming familiar with all available testing procedures. Moreover, the completed testing on invoices 23FF-015 and 2004GDAll18 indicate that Defendant was actually aware of the existence of testing procedures for these fireworks. Therefore, this Court need not determine whether the Government bears the burden of proving the existence of AFSA testing procedures: even if such a burden exists, the Government has met it here. Accordingly, the Court holds that Defendant knowingly imported 547 cartons of untested fountains and firecrackers that were susceptible to AFSL testing in flagrant violation of Paragraph 6.

---

[3]Invoice 23FF-016 lists 457 cartons of various varieties of firecracker. AFSL has testing procedures for firecrackers. *See* AFSL Standard 3 21-27.

C. Violation of Consent Decree ¶11 from the January 16, 2004 Letter of Advice

For the reasons described in Part A above, the Court adopts the magistrate's recommendation on this charge. The Government has not proven the Defendant's willing violation beyond a reasonable doubt.

D. Violation of Consent Decree ¶ 7 Regarding Invoice INV/204/315

The Government claims that the Defendant violated Paragraph 7 of the Consent Decree because he was aware of the incoming shipment of fireworks but failed to notify CPSC. Paragraph 7 states:

> Defendants shall notify the CPSC by facsimile or overnight express mail within two (2) business days of Defendants' being informed by any person that a shipment of fireworks devices ordered by Defendants or Related Persons is scheduled to arrive in the United States. Such notification must include all information received by Defendants, including, but not limited to, the date the shipment is scheduled to arrive and where the shipment is scheduled to arrive.

The magistrate found no violation of Paragraph 7 because he found that the Government had not

proven beyond a reasonable doubt that Defendant was aware of the incoming shipment of fireworks to his company Sky Slam Fireworks. Responding, the Government argues that the record shows the Defendant's timely knowledge of the shipment. (PI. Obj. 17).

The Court agrees with the magistrate's determination on this issue. The defendant was aware that his agent Ada Briden ordered this shipment of fireworks (Massari testimony 93), but neither the Defendant nor Ms. Briden was aware of the exact delivery date until the shipment arrived. (Briden testimony 507-08, 546.) The Government has provided no evidence to show the Defendant's actual knowledge of the information Paragraph 7 requires before the shipment actually arrived at Sky Slam

Fireworks in Florida.[4] Accordingly, the Government has not proven beyond a reasonable doubt that the Defendant was notified of the incoming shipment and willfully violated Paragraph 7.

E. The Punishment Imposed

The magistrate recommended that this Court impose a sentence of one day incarceration and a $500 fine. The Government objects to that recommendation, insisting that it is too lenient given Lomaz's history of willfully skirting the law. Instead, the Government urges this Court to impose a six month period of incarceration, order a $65,000 fine, and permanently ban Lomaz and those related from the fireworks business.

In determining a reasonable sentence, the Court considers several factors. These include the need to impose just punishment, afford adequate

---

[4]The Defendant's subsequent failure to notify CPSC violated Paragraph 8 of the Consent Decree, as the magistrate determined. Paragraph 8 states in relevant part: "Defendants shall notify CPSC by facsimile or overnight express mail within two (2) business days of Defendants' being informed by any person that a shipment of fireworks devices ordered by Defendants or Related Persons *has arrived* in the United States." (emphasis added).

deterrence, protect the public, reflect the seriousness of the offense, and to discourage the offender from engaging in unlawful conduct in the future.

In recent years, fireworks have caused many severe injuries and significant fire damage to homes and other structures.[5] Between 1997 and 2001, fireworks killed an average of fifteen people annually - seven from fireworks directly and eight more from

---

[5]Data from the American Academy of Pediatrics indicate that, on average, 12,000 fireworks-related injuries are reported annually. (Joe D'Aquila, Invitation to Disaster, *The Trentonian*, May 28, 2006, *available at* www.trentonian.com; *see also* Margie Colonian, Nat'l Fire Protection Assoc., A Long Road Back: A Story About Fireworks in Untrained Hands, *NFPA Journal*, Sept./Oct. 2004.) Half of those injured are children under the age of fifteen. (*Id.*). Most of the injuries to children are caused by mishandling (Child Welfare League of America, Health Tips: Fireworks Safety, *available at* http://www.cwla.org/), while nearly every fireworks-related injury to teenagers and adults is accompanied by alcohol use. (Heather Hatfield, WebMD, Light Up July 4th - Safely, June 25,2004, *available at* http://www.medicinenet.com/script/main/art.asp?articlekey=50282.) Generally, bystanders are injured more often than the fireworks users themselves. (*See* Child Welfare League of America, Health Tips.)

fires started by fireworks.[6] In addition, fireworks have cost between $15 and $20 million in property loss in each year since 1994.[7] Accounting for frequency and quantity of use, fireworks carry the highest risk of fire death of any consumer product available in the United States.[8] Moreover, illegal

---

[6]John R. Hall Jr., Nat'l Fire Protection Assoc., *Fireworks* 1, May 2005.

[7]*See id.* This figure does not include the cost of direct property damage to structures, which amounted to $26 million in 2002. *Id.*

[8]Hall 16-17.

fireworks[9] caused one-third of all fireworks-related injuries over the past decade.[10]

The Defendant's reckless and unlawful business practices increase the likelihood that such illegal or unregulated fireworks will reach the hands of American consumers, including children. Such lawlessness, if allowed to continue, will undoubtedly further contribute to injury, property damage, and perhaps death. It is therefore critical to impose a sentence that protects the public and deters the Defendant and others from such behavior.

---

[9]Federal law prohibits the use of explosives with over fifty milligrams of explosive components, including devices commonly referred to as M-80s, M-100s/ Silver Salutes, M-250s, and M1000s/Quarter Sticks. *See* Bureau of Alcohol, Tobacco, and Firearms, U. S. Dep't of Justice, "Illegal Explosives Devices," *available at* http://www.atf.gov/explarson/illegalexpldevices.pdf. Ohio permits sale of consumer fireworks, but only allows in-state use of sparklers and other novelty noise-makers. *See* National Council on Fireworks Safety, State Laws: Ohio, available at www.fireworksafety.com.

[10]Nat'l Fire Protection Assoc., Fact Sheet Sept./Oct. 2004, available at www.nfpa.org.

After weighing these considerations and the other sentencing factors, the Court believes that a sentence more severe than the magistrate's recommendation - but less severe than the Government's position - will best accomplish the goals stated above. The Court therefore imposes a sentence of30 days incarceration, and a $5000 fine. The Court further advises the defendant that further violations will suggest a disqualification from fireworks-related business activity for some period.

IV. Conclusion

For the foregoing reasons, the Court **ADOPTS** eleven of the Report and Recommendation's twelve determinations of whether the Defendant's violated the Consent Decree. The court **REJECTS** the magistrate's finding of no violation of Paragraph 6 from Invoice 23FF -016. As such, the Court finds the Defendant has committed nine contempt of court violations. The Court further **REJECTS** the Report's recommended penalty. Instead, the Court **ORDERS** the following sentence imposed on the Defendant: 30 days incarceration; and a $5000 fine.

IT IS SO ORDERED.

Dated: June 8, 2006

/s/ James S. Gwin
JAMES S. GWIN
United States District Judge

IN THE UNITED STATES IIISTRICT COURT FOR THE NOTHERN DISTRICT OF OHIO

Case NO: 5:99 cv 02240

United States of Amercia
Plaintiff

vs.

Larry Lomaz. el aI.,
Defendant (s)

Judge James S. Gwinn Magistrate Judge James Gallas

DEFENDANT (LOMAZ) ANSWER TO PLAINTIFF'S MOTION

Now come the defendant Larry Lomaz. Proc se. and request from this Honorable Court for leave for the defendant to tile Proc sc. his response to the CPSC motion in opposing the Honorable Judge Gallas findings.

The defendant is forced to file this response Proc Se as the defendants attorney Alex Jurczcnko has been suspended to practice as an attomey. Mr. Jurezenko has stop all communications with the

defendant. and the defendants have not been able to obtain the files. The defendant has made every effort by phoning, faxing, and speaking with Mr. Lester Potash who is the attorney for Alex Jurczenko. Mr. Potash stated to the defendant he not been in communication with Mr. Jurczenko in three weeks. The defendant would appreciate this Honorable Court issuing an order that the defendant's files be provided to the defendant as soon as possible.

Alter six days of hearings the defendant would request from this Honorable Court the findings of the Honorable Judge Gallas be accepted

Respectfully submitted,

/s/ Laurence De Leon Lomaz
Laurence De Leon Lomas (Pro Se)
8174 south Las Vegas Blvd.
Las Vegas, Nevada 89109
808-630-7980

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,
Plaintiff
v. Case No. 5:99 CV 2240

LARRY LOMAZ,
Defendant.

Judge James S. Gain
Magistrate Judge James Galas

PLAINTIFF'S NOTICE OF COMMUNICATION FROM DEFENDANT AND RELATED MATTERS

On March 3, 2005, the United States ("plaintiff") petitioned this Court for an order to show cause why Larry LOMAZ ("defendant") should not be found in contempt of the Consent Decree entered in this case by the Court on May 30, 2003 ("Consent Decree").

On June 16, 2005, Magistrate Judge James Galas issued an order granting plaintiff's petition to show cause. On August 11, 16, 17, 18, and 19, 2005, the Magistrate Judge heard evidence presented by witnesses for plaintiff and defendant.

The Magistrate Judge issued a Report and Recommendation on November 28, 2005, finding that the defendant had committed "willful defiance and evasion of [ ] portions of the order set forth in the May 2003 consent decree." According to the Report and Recommendation, any objections "must be filed with the Clerk within ten (10) days of mailing of this notice. Failure to file objections within the specified time WAIVES the right to appeal the Magistrate Judge's recommendation. See, United States v. Walters, 638 F.2d 947 (6th Cir. 1981); Thomas v. Am, 474 U.S. 140 (1985)."

Plaintiff timely filed objections on December 7, 2005, to portions of the Report and Recommendation of the Magistrate Judge, and served a copy on defendant's counsel. Defendant did not file objections to the Report and Recommendation, thereby waiving his right to object.

On January 4, 2006, plaintiff's counsel received via facsimile two letters signed by defendant dated January 3, 2006. In the first, which is a copy of a letter addressed to Alexander Jurczenko, defendant states that he is dismissing Mr. Jurczenko as his attorney. (Letter from defendant to defendant's counsel attached hereto as Exhibit A). In the second letter, which is addressed to plaintiff's counsel,

defendant confirms that he has dismissed Mr. Jurczenko as his attorney. (Letter from defendant to plaintiff attached hereto as Exhibit B). In this second letter, defendant requests plaintiff to provide him directly with the objections' to the Report and Recommendation that plaintiff filed. Plaintiff did so today. (Letter from plaintiff to defendant attached hereto as Exhibit C).

In addition to defendants communications, plaintiff received today a copy of Attorney Disciplinary Order No. 2005-37, which indefinitely suspends Mr. Jurczenko from the practice of law before the United States District Court for the Northern District of Ohio, pursuant to Local Rule 83.7 and Local Criminal Rule 57.7. (Order attached hereto as Exhibit D).

Given defendant's letters of January 3, 2006, as well as this Court's Disciplinary Order No. 2005-37, plaintiff respectfully urges this Court to direct defendant to retain new counsel immediately to represent him in this criminal contempt matter. Although defendant has waived his right to file objections to the Magistrate Judge's Report and Recommendation, see United States v. Walters, 638 F.2d 947 (6th Cir. 1981), plaintiff urges the Court, if it is going to allow newly retained defense counsel to

file any such objections, to require that those objections be filed no later than January 27,2006. If defendant chooses not to retain new counsel but instead to represent himself, plaintiff similarly urges the Court to require defendant to file any objections to the Magistrate Judge's Report and Recommendation no later than January 27, 2006. In making that request, plaintiff notes that its petition was filed ten months ago and that the petition focused on violations of this Court's Order of May 2003. Moreover, while the petition has been pending, defendant has been importing fireworks devices, including most recently in late 2005 into Hawaii. Presumably, defendant sold these fireworks devices during Hawaii's New Year's selling season, which takes place during the last several days of each year. Significantly, the Magistrate Judge's Report and Recommendation focused in part on defendant's conduct in Hawaii in December 2003 and December 2004.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

GREGORY WHITE
United States Attorney

OF COUNSEL:
Page C. Faulk
General Counsel

Harriet Kerwin
Attorney

U.S. Consumer Product
Safety Commission
Bethesda, MD 20814
(301) 504-7637

/s/ Jeffrey I. Steger
JEFFREY I. STEGER
SUZETTE A. SMIKLE
Trial Attorney
Office of Consumer
Litigation
U.S. Department of
Justice
Box 386
Washington, D.C. 20044
Phone: (202) 307-0052
Fax: (202) 514-8742

Attorneys for Plaintiffs

Dated: January 4, 2006

Exhibit A

Laurence De Leon Lomax
8174 South Las Vegas Blvd
Suite 109
Las Vegas, NV 89123
808.630.7980

January 3,2005

Mr. Alexander Jurczenko
1468 West Ninth Street
Suite 750
Cleveland, Ohio 44113
RE: CPSC

Dear Alex:

Your failure to respond to my phone calls, faxes, and letters over the last four weeks leaves me with no choice but to fire you.

I have also just learned the CPSC has filed objections and that you have also failed to advise me of this new motion.

Sincerely,
/s/ Laurence De Leon LOMAS
Laurence De Leon LOMAS

Exhibit B

Laurence De Leon Lomax
8174 South Las Vegas Blvd
Suite 109
Las Vegas, NV 89123
808.630.7980

January 3, 2005

Mr. Jeff Steger
202.514.8742

Dear Mr. Steger:

I have lost all contact with Alex. It has been four weeks. Another attorney that I know has not been able to reach him either. I have just learned of your objections. Please email those tome please, sol may read your motion, and decide if I wish to respond.

Alex is fired, and no longer will represent me.

Sincerely,
/s/ Laurence De Leon LOMAS
Laurence De Leon LOMAS

Exhibit C

U.S. Department of Justice,
Office of Consumer Litigation

Writer's Direct Telephone: (202) 307-0047
Facsimile: (202) 514-8742

Mailing address:
P.O. Box 386
Washington. DC 20044

Overnight Delivery:
1331 Pennsylvania Avenue, N.W.
Suite 950N
Washington, DC 20004

Via Federal Express and electronic mail

January 4, 2006

Laurence De Leon LOMAS
8174 South Las Vegas Blvd.
Suite 109
Las Vegas, Nevada 89123

Re: Case No. 5:99 CV2240

Dear Mr. LOMAS:

This morning I received via facsimile two letters signed by you dated January 3,2006. The first letter is a copy of a letter addressed to Alexander

Jurczenko. In that letter, you indicate that you are dismissing him as your counsel. The second letter is addressed to me and indicates that you have dismissed your attorney. The second letter also requests that I provide you directly with the objections filed by the government to the Report and Recommendation issued by Magistrate Judge James Galas.

Given your decision to dismiss your counsel, and in response to your request, attached is another copy of the Plaintiffs Objections to Portions of Report and Recommendation by Magistrate Judge. Plaintiff served Mr. Jurczenko a copy of its objections on December 7, 2005.

I urge you to retain new counsel immediately based on the relief sought by the government. I urge your new counsel to enter an appearance in this matter promptly, and to contact me.

Sincerely,
/s/ Jeffrey Steger
Jeffrey Steger

Attachment

cc: Alexander Jurczenko (via Federal Express) (w/o attachment)
Harriet Kerwin, Consumer Product Safety Commission (via e-mail) (w/o attachment)

Exhibit D

ATTORNEY DISCIPLINARY ORDER NO. 2005-37

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

IN THE MATTER OF		
ATTORNEY DISCIPLINARY	)	ATTORNEY
PROCEEDINGS	)	DISCIPLINARY
	)	Order № 2005-37
ALEXANDER JURCZENKO	)	
	)	
INDEFINITE SUSPENSION	)	
FROM PRACTICE BEFORE	)	05AT0023
THIS COURT	)	

On August 24, 2005. The Supreme Court of Ohio suspended Alexander Jurczenko from the practice of law for a period of two years with one year stayed on conditions set forth in its order.

This Court's Show Cause Notice dated September 1, 2005 advised Mr. Jurczenko of the opportunity to appear before the Committee on Complaints and Policy Compliance to show cause why the imposition of the identical discipline as was imposed by the Supreme Court of Ohio should not be imposed by this Court, pursuant to Local Civil Rule 83.7(0 and local Criminal Rule 57.7(f). By letter dated, September 9,2005, Mr. Jurczenko advised of

his desire to appear before the Committee and advised of his intention to be represented by counsel.

This matter came before the Committee on Monday, November 14, 2005. Mr. Jurczenko appeared, represented by his counsel, Lester Potash, Esq. An official court reporter was present.

Upon consideration, it is the determination of this Court that Alexander Jurczenko be indefinitely suspended from the practice of law before this Court, pursuant to Local Rule 83.7 and Local Criminal Rule 57.7.

The name of Alexander Jurcenzko shall be stricken from the roll of attorneys admitted to practice Jaw before the United States District Court for the Northern District of Ohio.

If an attorney, suspended under the above provisions. is later readmitted to practice law by The Supreme Court of Ohio, an Application for Reinstatement to practice before this Court may be filed with Geri M. Smith, Clerk of Court, Cart B. Stokes U.S. Court House, 801 West Superior Avenue, Cleveland, Ohio 44113-1830, A TIN: Committee on Complaints and Policy Compliance. The Application should include evidence that the attorney is in good standing in the highest court of any state, territory, the District of Columbia or in any district court of the United States.

IT IS SO ORDERED.

For the Court
/s/ James G. Carr
James G. Carr
Chief Judge
United States District Court

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the PLAINTIFF'S NOTICE OF COMMUNICATION FROM DEFENDANT AND RELATED MATTERS was filed electronically on this 4th day of January, 2005. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. In addition, a copy of this filing was sent via Federal Express to:

Laurence De Leon LOMAS
8174 South Las Vegas Blvd.
Suite 109
Las Vegas, Nevada 89123

/s/ Jeffrey Steger
Jeffrey Steger
Trial Attorney
Office of Consumer Litigation
U.S. Department of Justice
Phone: 202-307-0047
Fax: 202-514-8742